

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

1 ALEXIS M. HERMAN, Secretary of
2 Labor, United States Department
of Labor,

3
4 Plaintiff,

5 v.

6 HECTOR I. NIEVES TRANSPORT,
7 INC., a corporation; and
8 HECTOR I. NIEVES RIVERA,
9 individually and as President;
and LUZ M. ROSENDO DE NIEVES,
10 individually and as Secretary
and Treasurer,

11 Defendants.
12 -----

Civil No. 96-2479 (JAF)

DO FEB 23 1997

13
14 OPINION AND ORDER

15 On December 2, 1996, Plaintiff, Alexis M. Herman, Secretary of
16 Labor for the United States Department of Labor, filed suit pursuant
17 to the Fair Labor Standards Act of 1938 ("the FLSA" or "the Act"), 29
18 U.S.C. §§ 201-219 (1994), against Defendants, Héctor I. Nieves
19 Transport, Inc. ("Nieves Transport"); Héctor I. Nieves-Rivera
20 ("Nieves"), individually and as president of Nieves Transport; and
21 Luz M. Rosendo de Nieves ("Rosendo"), individually and as
22 secretary/treasurer of Nieves Transport, for allegedly violating the
23 overtime compensation and record-keeping provisions of the Act, 29
24 U.S.C. §§ 207(a) and 211(c).
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On January 15, 1999, we granted Plaintiff's motion for partial summary judgment and found that Defendants were not exempt from paying overtime compensation under section 13(b)(1) of the FLSA, 29 U.S.C. § 213(b)(1).

In a bench trial, we tried both alleged issues. At the close of trial on September 13, 1999, we granted Plaintiff's motion to conform the pleadings to the evidence presented. Subsequently, Plaintiff amended the pleadings to add violations of the minimum-wage provisions of the Act, 29 U.S.C. § 206.

Upon consideration of the evidence, the arguments of the parties, and the record, we make the following findings of fact and rulings of law.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER OF JUDGMENT**

I. FINDINGS OF FACT

A. Defendants as Employers of Truck Drivers

1. Defendant Nieves Transport is a corporation duly organized under the laws of the Commonwealth of Puerto Rico and is engaged in the business of transporting goods, including petroleum commodities, by truck.

2. Defendant Nieves Transport regulates the employment of all persons employed by them and acts, directly or indirectly, in the corporation's interest with respect to those employees.

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1 3. Defendant Nieves, residing within the jurisdiction of
2 this court, is president of Nieves Transport, actively controls and
3 manages this corporation by regulating the employment of its
4 personnel, and acts directly and indirectly in the interest of Nieves
5 Transport in relation to its employees. By Defendant Nieves' own
6 admission, he founded Nieves Transport and continues to direct its
7 operations.

8 4. Defendant Rosendo, residing within the jurisdiction of
9 this court, is secretary and treasurer of Nieves Transport, actively
10 controls and manages this corporation by regulating the employment of
11 its personnel, and acts directly and indirectly in the interest of
12 Nieves Transport in relation to its employees.

13 5. Defendants are employers of the employees listed in the
14 attached Appendixes A & B ("truck drivers" or "employees"), all of
15 whom were or are employed as truck drivers for Defendants.¹
16
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18
19 ¹After careful scrutiny and independent calculations of a
20 representative sample, we attach Plaintiff's Exhibit A and B as our
21 Appendixes A and B, respectively. We note that in situations like
22 the present where the employers have failed to keep adequate records,
23 see findings regarding record-keeping, a district court may rely upon
24 the Secretary's calculations to identify employees and calculate back
25 wages. See United States Dep't of Labor v. Cole Enter., Inc., 62 F.3d
26 775, 781 (6th Cir. 1995); Brock v. Norman's Country Market, Inc., 835
F.2d 823, 828 (11th Cir. 1988). As in Cole Enterprises, Plaintiff
here based the calculations on the employees' interview statements,
the employment records, and the employees' testimony at trial. See
Brief for Plaintiff at 28-29, Docket Document No. 33; Cole Enter., 62
F.3d at 781.

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6. Between June 20, 1993 and the present, Defendants have employed over one-hundred truck drivers.

7. Defendants, on average, employ approximately twelve truck drivers at any given time.

8. Defendants have employed personnel in commerce, as defined in 29 U.S.C. § 203(b),² in a business which, at all relevant times, has had an annual gross volume of sales of not less than \$500,000.

B. Nature of Business

9. Defendants employ truck drivers who regularly drive Defendants' trucks and transport materials, which oftentimes originate from various states within the United States, between points in Puerto Rico.

10. All deliveries made by Defendants' employees are between two locations within Puerto Rico.

11. The materials which Defendants' employees regularly deliver by truck include, inter alia, petroleum products, glass bottles, cardboard boxes, raw materials, freight of all kinds, food stuffs, and lumber.

12. Truck deliveries utilize either a container truck, consisting of a truck cab and an attached rectangular inter-modal

²Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

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1 container, or a tanker truck, consisting of a truck cab and an
2 attached tanker. Container trucks transport all cargo except
3 petroleum products; tanker trucks transport petroleum products.

4 13. Concerning container trips:

5 (a) In a container trip, an employee drives one of
6 Defendants' truck cabs from Nieves Transport's truck yard to a pre-
7 established location. When the driver reaches the destination, he
8 attaches an inter-modal container to the truck cab and delivers the
9 inter-modal container to another location, including, but not limited
10 to, Navieras, Sealand, Puerto Nuevo, TMT (Isla Verde), Sea Barge
11 (Isla Grande), and Puerta de Tierra.

13 (b) The customers to whose facilities the employees
14 transport the containers include Owens-Illinois, APA World Transport,
15 Goya, Casa de las Escaleras, and Futones.

16 (c) If the inter-modal container the driver has taken to
17 the customer's facility is empty, the driver exchanges the empty
18 container for a full one, waits while the empty container is filled,
19 or leaves the empty container at the facility. If the employee
20 exchanges the container or waits for the empty container to be
21 filled, once he has a full container, he attaches it to the truck's
22 cab and drives the truck to another client's location, where he
23 leaves the full inter-modal container, replaces it with an empty
24 container, and begins the whole process again.
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(d) If the inter-modal container the driver has taken to the customer's facility is full, the driver exchanges it for an empty one, waits while the full container is emptied, or leaves the full container at the facility. If the employee exchanges the container or waits for the full container to be emptied, once the container is empty, he attaches it to the truck's cab and drives the truck to another client's location, where he exchanges the empty container for a full one and begins the whole process again.

14. Concerning tanker trips:

(a) An employee drives a truck cab with an empty tanker attached from Defendants' truck yard to a pre-established location, where the tanker is filled with bunker or diesel. After the tanker is filled, the driver delivers the contents to one of the harbors in Puerto Rico or to a customer's facility, where the tanker is emptied. Once the tanker is empty, the driver either returns to Defendants' truck yard or to one of the harbors or other petroleum distribution locations, where the tanker is again filled with bunker or diesel.

(i) The locations where the petroleum products are loaded include, inter alia, Gulf, Esso, Sun Oil, Caribbean Petroleum, Texaco, Harbor Fuel at Pier 8 or the Frontier Pier in San Juan, Shell, and Piers 6 and 9.

(ii) The locations where the petroleum products are delivered and the tankers emptied include, inter alia, ships in Ponce

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1 and Mayaguez, barges in San Juan, the municipal piers in Mayaguez and
2 Ponce, Harbor Fuel, and Luis Ayala Colón in Ponce, as well as
3 facilities of various customers including Serrallés, Abbot, Owens-
4 Illinois, Starkist and Bumblebee, Carlos Ocasio, Haynes, Bristol,
5 Upjohn, Eli Lilly, and Life Savers.

6 (b) When loading or unloading bunker or diesel, truck
7 drivers almost always wait in line for a substantial amount of time
8 behind other trucks which are also awaiting their turn to load or
9 unload the petroleum product cargo they are carrying.

10 (i) The wait to load bunker or diesel is usually
11 several hours long because of the number of trucks in front of
12 Defendants' truck and because of the length of time it takes to load
13 each of those trucks. The average number of trucks ahead of
14 Defendants' truck is usually three. The time needed to load each of
15 those trucks with the bunker or diesel averages over forty minutes.

16 (ii) The wait to unload bunker or diesel is also
17 usually several hours long, again because of the number of trucks in
18 front of Defendants' truck and because of the length of time it takes
19 to unload each of those trucks. The average number of trucks ahead
20 of Defendants' truck is usually four trucks. The time needed to
21 unload the bunker or diesel from each of those tankers averages just
22 over one hour.

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1 (c) In addition, the tanker trips take a substantial
2 amount of time because:

3 (i) The distances between loading and unloading are
4 often great;

5 (ii) The bunker or diesel is a heavy product, and,
6 consequently, the truck drivers must steer their vehicles with great
7 caution and slow speed; and

8 (iii) The ship to be loaded with bunker often does
9 not arrive on schedule.
10

11 (d) Defendants' employees work during the day and night
12 while on bunker trips.

13 (i) The places to load and unload bunker and diesel
14 can be open twenty-four hours a day to accommodate the transfer of
15 the cargo.

16 (ii) Employees frequently arrive at a facility before
17 it opens to secure a choice position in the line of trucks. These
18 times can be as early as 1:00 A.M., as some petroleum distribution
19 refineries open at 3:00 A.M.
20

21 (e) Defendants assign tanker trips on the basis of
22 seniority.

23 (f) Despite the longer hours required, many employees
24 prefer tanker trips to container trips because:
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1 (i) Defendants pay more money for tanker trips than
2 container trips; and

3 (ii) The employee only has to drive on the tanker
4 trip, whereas a container trip requires that the driver also attach
5 and detach the inter-modal containers as part of his duties.

6 15. On days that employees drive Defendants' trucks, these
7 drivers spend the entire work day driving, loading, unloading, or
8 waiting in line. In most instances, employees do not take time to
9 eat a meal, but rather buy or bring food and eat it later when they
10 reach their destination or while they are waiting in line. Employees
11 do not take time for meals because if the employee stops to eat,
12 other trucks may reach their mutual, final destination before him,
13 thereby increasing the amount of time the employee will have to wait
14 in line behind other trucks.
15

16 16. Defendants have no corporate or other relationship
17 with the ocean-going vessels, oil-refineries, local retail sellers of
18 oil products, or any other person or entity for which Defendants'
19 employees transport materials, except to the extent that these
20 persons are customers or clients of Defendants.
21

22 C. Defendants' Method of Payment to Their Truck Drivers

23 17. Since at least June 1993, Defendants have paid their
24 truck drivers by the trip rather than by the hour. Defendants do not
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1 pay their employees any remuneration for their work other than the
2 per-trip rate.

3 18. Defendants pay their employees a fixed amount for each
4 type of trip. For example, Defendants pay their employees \$60 for a
5 tanker trip to Mayaguez, \$35 for a tanker trip to Abbott, \$5 for a
6 trip with an empty container to Goya (\$7 with a full container), and
7 \$10 for a trip to Owens-Illinois with an empty container (\$12 for a
8 trip with a full container).

9
10 19. Regardless of the trip's time duration, the trip rate
11 does not vary.

12 20. Although Defendants adduced some evidence that other
13 trucking companies in Puerto Rico also pay their drivers on a per-
14 trip rate, Defendants did not present proof that these same companies
15 do not supplement the per-trip rate with overtime or minimum wage
16 compensation.

17
18 **D. The Amount of Time that Truck Drivers Worked**

19 21. The fourteen employees who appeared before this court
20 - including three who testified for Defendants - uniformly testified
21 to working more than eight hours per day.

22 22. These employees also testified, and the trip records
23 establish, that they drive the trucks - except in a few workweeks -
24 between five and seven days per week.

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1 23. The witnesses testified that other employees drive the
2 same trips, working hours similar to those worked by the employees
3 who testified. The witnesses were familiar with the work patterns of
4 other employees because the employees keep in contact by radio when
5 they are driving and in person when they are waiting in line.

6 24. The actual number of hours each employee works on a
7 given day varies by the types of trips that he drives that day, which
8 can be any one of the following:

- 9 (a) A day when an employee drives only container trips;
10 (b) A day when an employee drives only tanker trips;
11 (c) A day when an employee starts the day driving container
12 tips and then switches and begins driving tanker trips; or
13 (d) A day when an employee starts the day driving tanker
14 trips and then switches and begins driving container trips.
15

16 25. Based on the employees' testimony, the average number
17 of hours that an employee drives per day is as follows:

- 18 (a) Twelve hours per day when driving only container trips;
19 (b) Fifteen hours per day when driving only tanker trips;
20 (c) Twenty-two hours per day when driving container trips
21 and then switching to tanker trips; and
22 (d) Fourteen hours per day when driving tanker trips and
23 then switching to container trips.
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1 26. The number of each type of day's driving that an
2 employee does in a representative week can be determined for 60 of
3 the 101 employees either from the trip records or from the employees'
4 testimony.

5 27. In addition to the sixty employees, there are forty-
6 one employees who are not included in the trip records produced by
7 Defendants and who did not testify. Accordingly, the actual number
8 of hours each of these forty-one employees drive in a typical week
9 cannot be determined as they have been for the sixty employees for
10 whom employment records exist. The only fair way to establish the
11 hours these employees drive per week is to use the average number of
12 hours the sixty employees, discussed above, drive per week.
13

14 28. The average of the hours that each of these sixty
15 employees spend driving is sixty-eight hours per week.
16

17 29. Accordingly, we use sixty-eight hours as the average
18 number of hours that the remaining forty-one truck driver employees
19 work per week driving trucks.

20 30. In addition to driving the trucks, Defendants' truck
21 drivers wash the trucks assigned to them each weekend.

22 31. Defendants do not pay the employees for washing the
23 trucks.

24 32. Employees on average spend approximately four hours
25 washing Defendants' trucks.
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1 33. If an employee refuses to wash his truck, employees
2 have testified that Defendants have refused to schedule work for the
3 employee for several days, given the preferred schedules to other
4 drivers, and, in one instance, fired an employee.

5 34. Given the circumstances under which Defendants'
6 employees have to wash the trucks assigned to them, we do not find
7 credible Defendants' assertions that they did not require their
8 employees to wash their trucks every week. On the contrary, we find
9 that washing trucks was one of the duties of the employees.
10

11 35. The total number of hours each of the employees works
12 per week is between 58 and 105 hours per week, and the average number
13 of hours worked by the truck drivers is seventy-two, including time
14 spent washing the trucks.

15 **E. Overtime Violations**

16 36. For the period June 1993 to, at least, September 1999,
17 Defendants conceded that they did not pay their employees overtime
18 compensation for hours in excess of forty that they worked.
19

20 37. For all relevant workweeks between June 20, 1993, and,
21 at least, September 13, 1999, Defendants have employed truck drivers
22 who have worked more than forty-hour weeks and yet not received
23 overtime compensation.
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1 38. Since Defendants' truck drivers worked over forty-hour
2 weeks and Defendants have never paid them overtime compensation for
3 these hours, Defendants owe the truck drivers overtime compensation.

4 39. To compute the overtime back wages due to Defendants,
5 truck driver employees, each employee's regular hourly rate of pay
6 for each particular week must be established.

7 (a) When, as here, an employee is paid on a per-trip
8 basis, the employee's regular hourly rate for a given week is
9 determined by dividing the total (gross) amount the employee is paid
10 by the number of hours he worked.

11 (b) Once such regular rate is established, the employee
12 "is then entitled to extra half-time pay at this rate for all hours
13 worked in excess of 40 in the workweek." 29 C.F.R. § 778.112.

14 (c) We followed this formula specified in 29 C.F.R.
15 § 778.112 in calculating the overtime back wages due in this case.

16 (i) Defendants' payroll records helped determine the
17 gross pay for each employee.

18 (ii) The number of hours each employee works per week
19 is established as discussed in Findings of Fact, Numbers 21-35.

20 (iii) When the gross pay per week is divided by the
21 number of hours worked per week, the employee's regular rate for that
22 week is established.

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1 (iv) Once the regular rate is thus determined
2 pursuant to 29 C.F.R. § 778.112, the overtime back wages are
3 calculated by multiplying that regular rate by the number of overtime
4 hours the employee works in the week, dividing this product in half,
5 and adding the result of the division to the product.

6 (v) Adding all the half-time due for all of the weeks
7 the employee works gives the total overtime back wages that the
8 employee is owed.

9
10 (d) The Wage-Hour regulations mandate this procedure in a
11 situation where employee drivers are paid on a per-trip basis that
12 employee's "regular rate is determined by totaling all the sums
13 received at such . . . job rates in the workweek and dividing by the
14 total hours actually worked." 29 C.F.R. § 778.112.

15 40. If the regular rate thus established is below the
16 federally-mandated minimum wage, the regular rate must be raised to
17 the minimum wage rate before the calculation is done. Once the
18 regular rate has been raised to the minimum wage rate, the
19 calculation is precisely the same - the minimum wage regular rate is
20 multiplied by the number of overtime hours worked and the resultant
21 figure is divided in half, to give the additional half-time required
22 for the overtime hours.

23
24 41. In the instant case, calculations performed pursuant
25 to the above formula reveal that Defendants owe a total amount of
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overtime back wages of \$289,062.62 to 101 of their truck driver employees. The amount of overtime back wages due to each of these employees is specified in Appendixes A and B.

F. Minimum Wage Violations

42. From April 1, 1991, to October 1, 1996, the minimum wage was \$4.25 an hour. From October 1, 1996, to September 1, 1997, the minimum wage was \$4.75 per hour. On September 1, 1997, the minimum wage rose to \$5.15 per hour.

43. From September 14, 1996, until September 13, 1999, Defendants regularly paid their employees at rates below the minimum wage, as specified in Appendix A.

44. Given the calculations in Appendix A, Defendants owe a total amount of minimum wage back wages of \$129,295.70 to seventy-nine of their truck drivers for the same three-year period. The amount of minimum wage back wages due to each employee is specified in Appendixes A and B.

G. Record-Keeping Violations

45. It is undisputed that Defendants keep no records of the number of hours that their employees work.

46. Defendants have not alleged nor argued that they keep records of how many hours their truck drivers work. Defendants' payroll records support this finding.

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1 47. The testimony of the truck drivers confirmed the fact
2 that Defendants do not maintain records of the number of hours worked
3 by employees.

4 48. Thus, Defendants have failed to record the total daily
5 and weekly hours employees worked, the employees' regular hourly
6 rates of pay for each week that overtime is worked, and the total
7 weekly premium pay for overtime hours, as required by 29 C.F.R.
8 §§ 516.2 and 516.5.

9
10 **H. Willfulness and Statute of Limitations**

11 49. At the beginning of her investigation of Defendants in
12 1995, the Wage-Hour Investigator for the Department of Labor informed
13 Defendants of their responsibility under the Act to maintain records
14 and pay minimum wage and overtime, as needed.

15 50. Instead of complying, Defendants have attempted to
16 excuse their continuing violations of the Act. First, during the
17 original investigation in 1995, Defendants argued that their truck
18 driver employees are independent contractors. Ultimately, Defendants
19 dropped this defense after the complaint was filed, and substituted
20 the argument of an exemption under section 13(b)(1) of the Act, 29
21 U.S.C. § 213(b)(1).
22

23 51. This section 13(b)(1) argument was never made to the
24 Wage-Hour Investigator during the investigation, arising for the
25 first time in Defendants' answer to the complaint.
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1 52. Even after this court ruled in January 1999 that there
2 is no section 13(b)(1) exemption under the facts in this case,
3 Defendants have continued their remuneration practices and raised
4 again in their brief to the court, as their primary argument, the
5 section 13(b)(1) defense.

6 53. Similarly, Defendants have never kept the records of
7 pay and hours worked required by section 11(c) of the Act.

8 54. Under the "Waiver of the Statute of Limitations"
9 executed by the parties herein, the applicable statute of limitations
10 is counted back from June 20, 1996, rather than from the date the
11 complaint was filed, December 2, 1996.

12 55. As discussed herein, Defendants' violations of the Act
13 are willful and, therefore, the statute of limitations permits
14 employees to recover back wages for overtime compensation from
15 Defendants commencing three years prior to June 20, 1996, or June 20,
16 1993.
17

18
19 **I. Liquidated Damages**

20 56. Defendants' lack of good faith in their failure to pay
21 their employees the required wages is demonstrated by their
22 continuing, unsuccessful - if not frivolous - excuses for not
23 complying with the Act, first with an independent contractor defense,
24 and then with a section 13(b)(1) defense.
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1 (a) That such defenses are not objectively reasonable is
2 demonstrated by the fact that the only defense Defendants raised
3 during the investigation (the independent contractor argument) was
4 hastily abandoned once the litigation commenced, and the second
5 defense (the section 13(b)(1) argument) has been ruled against by
6 this court.

7 57. Defendants adduced some evidence that other trucking
8 companies in Puerto Rico also pay drivers on a trip rate basis.

9 58. However, Defendants did not adduce any evidence that
10 when other trucking companies pay drivers by the trip, such trucking
11 companies do not pay proper overtime and minimum wages to those
12 drivers.
13

14 J. Injunction Restraining Future Violations of the Act

15 59. Following the Department of Labor investigation and
16 even following the court's ruling that Defendants were not exempt
17 under section 13(b)(1) of the Act, at which time Defendants
18 unequivocally knew that they are required to keep records and pay
19 their truck driver employees overtime compensation under the Act,
20 Defendants have refused intentionally to pay the required overtime
21 compensation, as well as continuing to violate the minimum wage and
22 record-keeping provisions of the Act.
23

24 60. Indeed, Defendants presently continue not to pay
25 proper overtime and minimum wage compensation, and still are not
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1 recording employees' hours of work, thereby continuing to violate the
2 wage and record-keeping requirements of the Act.

3 61. Such continued, consistent refusal to comply with the
4 FLSA's requirements mandates the issuance of an injunction and
5 renders any future promises of compliance unreliable.

6 **II. CONCLUSIONS OF LAW AND SPECIFIC FINDINGS IN SUPPORT THEREOF**

7 **A. Statute of Limitations**

8 Actions to recover unpaid minimum wages, unpaid overtime
9 compensation, and liquidated damages under the FLSA should be filed
10 within two years of the cause of action. See 29 U.S.C. § 255(a)
11 (1994). If, however, the violations of the Act are willful, the
12 action to recover damages may be filed within three years of the date
13 that the cause of action accrued. See id.

14 In this case, the relevant period of inquiry would thus be from
15 December 2, 1996, until September 13, 1999. However, under the
16 "Waiver of the Statute of Limitations" executed by the parties, the
17 applicable statute of limitations for overtime back wages is counted
18 back from June 20, 1996, rather than December 2, 1996, the date the
19 complaint was filed. See attached Appendix C.

20 **B. Defendants as Employers**

21 The Act defines employer as "any person acting directly or
22 indirectly in the interest of an employer in relation to an employee
23 and includes a public agency, but does not include any labor
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organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d).

Four factors determine whether a person is an employer under the Act. An employer has the ability to hire and fire employees, supervise and control employee work schedules or conditions of employment, determine the rate and method of payment, and maintain employment records. See Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) (relying on the factors utilized in Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)).

With regard to the 101 truck drivers of this case, Defendants have hired them all, fired several of them, set a per-trip rate of pay, and maintained records of the trips that many employees have performed for Defendants. Accordingly, we find, and both parties concede, that Defendants Nieves Transport, Nieves, and Rosendo are employers under the Act.

C. Coverage

The FLSA pertains to every employee who works for an "enterprise engaged in commerce or in the production of goods for commerce." See 29 U.S.C. §§ 206(a), 207(a)(1), 211(c). Given our previous factual findings, we find that Defendants are an enterprise within section 3(r) of the Act because they are engaged in related activities with

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unified operations or common control for a common business purpose.

See 29 U.S.C. § 203(r); Falk v. Brennan, 414 U.S. 190, 196 n.8 (1973).³

Given that Defendants employ truck drivers for the transportation of various goods and gross over \$500,000 during the

³According to the Act, enterprise is defined as:

[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

29 U.S.C. § 203(r).

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relevant time period, we find that they constitute an enterprise engaged in commerce under 29 U.S.C. § 203(s)(1)(A).⁴ Therefore, Defendants' truck drivers have been employed in an enterprise engaged in commerce from June 20, 1993 until, at least, September 13, 1999.

As we have stated, under 29 U.S.C. § 255(a), the statute of limitations bars wage claims occurring more than two years prior to the date the complaint is filed, unless the violation is found to be willful, in which case the period of recovery is three years. A violation of the FLSA is willful within the meaning of section 6 of the Portal-to-Portal Act if "[t]he employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988); see Baystate Alternative Staffing, 163 F.3d at 679; Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079-80 (1st Cir. 1995) (quoting Richland Shoe Co., 486 U.S. at 133). Similarly,

⁴The Act defines, in relevant part, an enterprise engaged in commerce or in the production of goods for commerce as an enterprise that:

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).

29 U.S.C. § 203(s)(1)(A).

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1 the term willfulness is synonymous with the terms "voluntary,"
2 "deliberate," and "intentional". Richland Shoe Co., 486 U.S. at 133.
3 "Neither an employer's good faith nor his ignorance of the governing
4 statutes and regulations precludes a finding of willfulness." Dole v.
5 Solid Waste Servs., Inc., 733 F.Supp. 895, 927 (E.D. Pa. 1989)
6 (quoting Donovan v. Sabine Irrigation Co., Inc., 695 F.2d 190, 196
7 (5th Cir. 1983)) (citations omitted).

8 We find that Defendants deliberately and intentionally violated
9 the Act. Since 1995, Defendants have known of the Act's minimum
10 wage, overtime compensation, and record-keeping requirements.
11 Nevertheless, they have continued to underpay their employees and
12 keep inadequate employment records. In addition, even after January
13 1999, when Defendants knew that neither the independent contractor or
14 the section 13(b)(1) defense was available to them, Defendants
15 obstinately refused to comply with the requirements of the Act. We
16 find such a deliberate, recalcitrant snubbing of the Act to be
17 willful. Therefore, Defendants willfully violated sections 6, 7,
18 11(c), 15(a)(2), and 15(a)(5) of the Act.

19 Because the violations were willful, the statute of limitations
20 permits employees to recover unpaid overtime compensation from
21 Defendants commencing three years prior to June 20, 1996, or June 20,
22 1993. For minimum wage violations, the three-year statute of
23 limitations will be counted back from the date that we granted
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1 Plaintiff's motion to amend the pleadings to conform to the proof
2 presented at trial and to allege violations of the minimum wage
3 provisions of the Act. Thus, the three-year statute of limitations
4 for minimum wage violations is three years back from September 13,
5 1999, or September 14, 1996.

6 **D. Representative Testimony**

7 Generally, an employee who brings suit against his employer for
8 unpaid minimum wages or overtime compensation has the burden of
9 proving that the employer did not compensate him for completed work.
10 See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).
11 "When the employer has kept proper and accurate records, the employee
12 may easily discharge his burden by securing the production of those
13 records." Id. However, where an employer violates his statutory duty
14 to keep an accurate record of all of the hours worked by its
15 employees, the employee,
16

17 [h]as carried out his burden if he proves that
18 he has in fact performed work for which he was
19 improperly compensated and if he produces
20 sufficient evidence to show the amount and
21 extent of that work as a matter of just and
22 reasonable inference. The burden then shifts to
23 the employer to come forward with evidence of
24 the precise amount of work performed or with
25 evidence to negative the reasonableness of the
26 inference to be drawn from the employee's
evidence.

Mt. Clemens, 328 U.S. at 687-88.

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1 It is well established that not all employees need testify in
2 order to prove the violations or to recoup back wages. See Mt.
3 Clemens, 328 U.S. 680 (8 out of 300 employees testified). Mt.
4 Clemens has been interpreted to allow back-pay awards for FLSA
5 violations to a group of employees where only some of these employees
6 testified as to hours worked and wages paid, the overall damage award
7 being reasonably inferred. See, e.g., Reich v. Southern New England
8 Telecomms. Corp., 121 F.3d 58, 66-68 (2nd Cir. 1997) (representative
9 testimony of 39 of approximately 1,500 employees, or 2.5 percent of
10 the total number of employees for whom back wages were sought, was
11 adequate to support an award of back wages for all of the employees);
12 Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 472-73 (11th Cir.
13 1982) (23 employees testified; back wages awarded to 207 employees);
14 Brennan v. General Motors Acceptance Corp., 482 F.2d 825, 829 (5th
15 Cir. 1973); McLaughlin v. DialAmerica Mktg., Inc., 716 F.Supp. 812,
16 824-25 (D.N.J. 1989) (testimony of 43 witnesses, both at trial and by
17 deposition, confirms existence of violations for approximately 350
18 non-testifying employees); Donovan v. Kaszycki & Sons Contractors,
19 Inc., 599 F.Supp. 860, 868 (S.D.N.Y. 1984) (29 employees testified by
20 deposition; backwages awarded to over 200 employees).

21 Thus, in a typical FLSA case, the Secretary presents testimony
22 from some of the affected employees as part of the proof of a prima
23 facie case. The Secretary then can rely on testimony and evidence
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1 from representative employees to meet the initial burden of proof
2 requirement. See Dole v. DeSisto, 929 F.2d 789, 792 n.1 (1st Cir.
3 1991) (citations omitted); see also Martin v. Selker Bros., Inc., 949
4 F.2d 1286, 1298 (3rd Cir. 1991) ("It is not necessary for every single
5 affected employee to testify in order to prove violations or recoup
6 back wages. The testimony and evidence of representative employees
7 may establish prima facie proof of a pattern and practice of FLSA
8 violations.") (citations omitted).

9
10 We also find that Plaintiff is not required to show, nor are we
11 required to determine, the precise number of hours worked by non-
12 testifying employees. Rather, the Secretary need only present
13 sufficient evidence for us to make a reasonable inference as to the
14 number of hours worked by non-testifying employees. Where, as in the
15 present case, plaintiff's proof establishes the presence of practices
16 in violation of the Act, the existence of the violations as well as
17 an award of backwages may be inferred for employees that do not
18 testify. See Marshall v. Mammas Fried Chicken, Inc., 590 F.2d 598,
19 599 (5th Cir. 1979) (per curiam) ("Although the evidence was not
20 perfectly accurate, it provided a sufficient basis to calculate the
21 number of hours worked by each employee.") (citations omitted).

22
23 Once violations of the Act's provisions are found and plaintiff
24 has produced sufficient evidence to calculate the wages due as a
25 matter of just and reasonable inference, the burden shifts to the
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1 employer to produce evidence of the exact amount of work performed or
2 to negate the reasonableness of the plaintiff's evidence. See Mt.
3 Clemens, 328 U.S. at 687-88. To rebut Plaintiff's evidence,
4 Defendants must produce a precise accounting of hours worked by their
5 employees. See Brock v. Seto, 790 F.2d 1446, 1448-49 (9th Cir. 1986)
6 (quoting Mt. Clemens, 328 U.S. at 693); Skipper v. Superior Dairies,
7 Inc., 512 F.2d 409, 420 (5th Cir. 1975).

8 We find that the testimony of the fourteen truck drivers who
9 testified at trial provides us with an adequate basis for determining
10 the average number of hours worked by both the testifying and the
11 non-testifying employee truck drivers. The evidence adduced by
12 Plaintiff was more than sufficient to establish a pattern and
13 practice of Defendants' violations of the Act and provide the court
14 with sufficient proof to show the amount and extent of Defendants'
15 truck drivers' work as a matter of just and reasonable inference.
16

17 After Plaintiff adduced such evidence, the burden shifted to
18 Defendants to produce evidence of the exact amount of work performed
19 or to negate the reasonableness of Plaintiff's evidence with a
20 precise accounting of hours worked by employees. Defendants did not
21 meet their burden of proof on this issue. We find that the employees
22 who testified on Defendants' behalf substantiated the violations of
23 the Act proven by Plaintiff. Defendants could not - and did not -
24 make the required accounting. Because the Plaintiff adduced
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1 compelling, representative testimony concerning the hours worked by
2 Defendants' truck drivers, we find that we can reasonably infer the
3 number of hours worked per week by all of Defendants' truck drivers
4 for the period in question.

5 **E. Overtime Compensation Violations**

6 Section 7(a)(1) prohibits employers from employing any worker
7 "for a workweek longer than forty hours unless such employee receives
8 compensation [for those hours worked in excess of forty during the
9 same week] . . . at a rate not less than one and one-half times the
10 regular rate at which he is employed." 29 U.S.C. § 207 (a)(1).
11 Section 15(a)(2) of the Act makes it unlawful to violate section 7 of
12 the FLSA. See 29 U.S.C. § 215(a)(2). An employee's regular hourly
13 rate of pay is determined "by dividing his total remuneration for
14 employment . . . in any workweek by the total number of hours
15 actually worked by him in that workweek." 29 C.F.R. § 778.109 (1998).
16
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18 In this case, Defendants pay their truck drivers for the type of
19 trips they complete, not by the number of hours worked on any
20 particular or all tasks. Defendants' employees receive no other form
21 of remuneration. In such situations, the employee's "regular rate is
22 determined by totaling all the sums received at such . . . job rates
23 in the workweek and dividing by the total hours actually worked." 29
24 C.F.R. § 778.112. Once the regular rate is established, the employee
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1 is "entitled to extra half-time pay at this rate for all hours worked
2 in excess of 40 in the workweek." Id.

3 In this case, Defendants have violated sections 7 and 15(a)(2)
4 of the Act by employing employees for workweeks of over forty hours
5 without compensating them at time and one-half the employee's regular
6 rate of pay for hours in excess of forty which they worked.

7 To determine the number of hours that Defendants' employees
8 worked in any given week, we must first identify which activities
9 performed by the employees qualify as part of their employment. An
10 "activity is employment under the Act if it is done at least in part
11 for the benefit of the employer, even though it may also be
12 beneficial to the employee. 'The crucial question is not whether the
13 work was voluntary but rather whether the [employee] was in fact
14 performing services for the benefit of the employer with the
15 knowledge and approval of the employer.'" Secretary of Labor v. E.R.
16 Field, Inc., 495 F.2d 749, 751 (1st Cir. 1974) (quoting Republican
17 Publ'g Co. v. American Newspaper Guild, 172 F.2d 943, 945 (1st Cir.
18 1949)). Employment activities may include acts "performed either
19 before or after the regular work shift, on or off the [road], if
20 those activities are an integral and indispensable part of the
21 principal activities for which covered workmen are employed and are
22 not specifically excluded by section 4(a)(1) of the [Portal-to-Portal
23 Act, 29 U.S.C. §§ 251-262 (1994)]." Steiner v. Mitchell, 350 U.S.

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247, 256 (1956); see Ballou v. General Elec. Co., 433 F.2d 109, 110
(1st Cir. 1970).

In this case, Defendants' employees drove trucks as their principal activity. They also spent time: (1) waiting in line for their trucks to be loaded and unloaded; (2) washing the trucks assigned to them; (3) checking and servicing the trucks; and (4) fueling the trucks. We consider these secondary activities to be integral and indispensable to the employees' truck driving duties. See Barrentine v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 51 (8th Cir. 1984); Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 725 (5th Cir. 1961). Accordingly, the time that the employees spent driving Defendants' trucks and engaging in these other activities are covered by the Act and not specifically excluded by the Portal-to-Portal Act. See Reich v. John Alden Life Ins., 126 F.3d 1, 6 (1st Cir. 1997) (relying on Newspapers of New England, 44 F.3d 1060); see also Mitchell, 286 F.2d at 723. Thus, in conformity with the Act's minimum wage and overtime requirements, Defendants should have maintained records of these activities and compensated the truck drivers for the time worked on them.

In summary, Defendants, in all workweeks between June 20, 1993, and the present, have violated the provisions of sections 7 and 15(a) (2) of the Act by employing employees for workweeks longer than those prescribed in section 7 of the Act without compensating said

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employees for their hours over forty per week at time and one-half the employees' regular rates of pay. Therefore, Defendants are liable for unpaid overtime compensation under section 7 of the Act, and an equal amount in liquidated damages under section 16(c) of the Act.

F. Minimum Wage Violations

Section 6(a)(1) of the Act, 29 U.S.C. § 206(a)(1), requires an employer in an enterprise engaged in commerce or in the production of goods for commerce to pay each of its employees not less than the applicable minimum wage. This provision hopes to guarantee a minimum livelihood to those workers covered by the Act. See United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 490 (2nd Cir. 1960) (citing Conference Report, H.R. Rep. No. 2738, 75th Cong., 3d Sess. 28 (1938); Sen. Rep. No. 884, 75th Cong., 1st Sess. 1-3 (1937); H.R. Rep. No. 1452, 75th Cong., 1st Sess. 8-9 (1937)). To accomplish Congress' objective for the minimum wage provision, "the total weekly wage paid by an employer [should meet] the minimum weekly requirements of the statute, such minimum weekly requirement being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement." Id.

As demonstrated by Appendix A, Defendants, between September 13, 1996 and September 14, 1999, have repeatedly violated sections 6 and 15(a)(2) of the Act by paying their employees below the minimum rate

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prescribed in section 6 of the Act, 29 U.S.C. § 206(a)(1).
Therefore, Defendants are liable for unpaid minimum wage
compensation, as calculated in Appendixes A and B.

G. Record-keeping Violations

Section 11(c) of the Act requires an employer to "make, keep,
and preserve such records of the persons employed by him and of the
wages, hours, and other conditions and practices of employment
maintained by him." 29 U.S.C. §211(c). Section 15(a)(5) of the Act
makes it unlawful to violate section 11(c). See 29 U.S.C. 215(a)(5).

The Secretary's implementing regulations are found at 29 C.F.R.
§ § 516 and require, inter alia, that employers preserve, for three
years, true and accurate records of: (1) the total daily and weekly
hours employees work; (2) employees' regular hourly rates of pay for
each week that overtime is worked; (3) the total daily or weekly
straight-time earnings; and (4) the total weekly premium pay for
overtime hours. See 29 C.F.R. § §§ 516.2 and 516.5; see, e.g., Myers
v. Copper Cellar Corp., 192 F.3d 546, 551 n.8 (6th Cir. 1999);
American Library Ass'n v. Reno, 33 F.3d 78, 91 (D.C. Cir. 1994);
Kaszycki, 599 F.Supp. at 867-68 (citations omitted).

Given the testimony of numerous witnesses, including Defendant
Nieves, we find that Defendants violated 29 U.S.C. §§ 211(c) and
215(a)(5) by not maintaining adequate employment records of their
truck drivers.

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H. Liquidated Damages

Pursuant to the authority granted to the Secretary of Labor by 29 U.S.C. § 216(c), Plaintiff seeks liquidated damages in this action. Section 16(b) of the Act specifically permits liquidated damages in such types of actions. 29 U.S.C. § 216(b).⁵ Liquidated damages are meant to compensate employees for the losses that the employees have suffered by reason of not receiving money due them at the time that it was due. See Commissioner of Internal Revenue v. Schleier, 515 U.S. 323, 331 (1995) (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583-84 (1942)). A court must grant liquidated damages unless the defendant establishes both that: (1) the violative acts or omissions by defendant were committed in good faith; and (2) the defendant had reasonable grounds for so acting. See McLaughlin v. Hogar San Jose, Inc., 865 F.2d 12, 13-14 (1st Cir. 1989). Defendants generally do not meet this two-prong burden. See Southern New England Telecomms. Corp., 121 F.3d at 71 (quoting Brock v. Wilamowsky, 833 F.2d 11, 19 (2nd Cir. 1987)); Walton

⁵The section provides in relevant part:

Any employer who violates the provisions of section 6 and 7 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and an additional equal amount in liquidated damages.

29 U.S.C. § 216(b).

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1 v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986).

2 Finally, an unsuccessful motion to claim an exemption under section
3 13(b)(1) of the Act does not preclude a finding of a lack of good
4 faith and objective reasonableness. See Solid Waste Services, 733
5 F.Supp. at 928-30.

6 We find that Defendants failed to show subjective good faith and
7 objective reasonableness by not paying their truck drivers the
8 minimum wages and overtime compensation due them. Having been
9 informed of their responsibilities by the Wage-Hour Inspector,
10 Defendants knew of the minimum wage, overtime compensation, and
11 record-keeping requirements. Nevertheless, they continued to under-
12 compensate their employees. Accordingly, we award the employees an
13 amount equal to the damages for unpaid backwages. See General Motors
14 Acceptance, 482 F.2d at 829.

15
16 **I. Prospective Injunction**

17 Section 17 of the Act allows a court, in its reasonable
18 discretion, to issue an injunction restraining future violations of
19 the Act. See 29 U.S.C. § 217; Wirtz v. Flame Coal Co., 321 F.2d 558,
20 560 (6th Cir. 1963). However, the Court's discretion is not
21 unbridled, see Dunlop v. Davis, 524 F.2d 1278, 1280 (5th Cir. 1975),
22 and the Court, when exercising it, should consider that the Secretary
23 vindicates a public, and not a private, right in seeking an
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injunction. See Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383
(9th Cir. 1987).

In determining whether to enjoin future violations, a trial judge should weigh the finding of a violation of the Act against various factors indicating reasonable likelihood that future violations will not occur. These include: (1) intent to comply; (2) extraordinary efforts to prevent recurrence; (3) absence of repetitive violations; and (4) absence of bad faith. See Martin v. Coventry Fire District, 981 F.2d 1358, 1362 (1st Cir. 1992) (citing Big Bear Market, 825 F.2d at 1383).

In addition, an injunction merely requires that a person do what ought to be done.

The issuance of an injunction . . . is not a drastic remedy. The court merely requires the defendant to do that which the law commands. The primary function of the injunction is to shift the responsibility for monitoring compliance with the Act from the Labor Department to the employer. It has been indicated that fairness in economy of administrative effort requires that after an employer has violated the provisions of the Act, he should bear the burden of future compliance.

Hodgson v. Parke, 324 F.Supp. 1297, 1300 (S.D. Tex. 1971) (citing Goldberg v. Cockrell, 303 F.2d 811 (5th Cir. 1962)); see also Hodgson v. First Fed. Savs. & Loan Ass'n of Broward County, Fla., 455 F.2d 818, 826 (5th Cir. 1972); DialAmerica, 716 F.Supp. at 826-27 (injunctions are issued because of public interest and to relieve

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Secretary of the burden of enforcement). Thus, in determining whether to issue an injunction, we should also balance the light burden the injunction would impose on the employer against the heavy administrative and investigative responsibilities which non-issuance would place on the Department of Labor. See Brennan v. City Stores, Inc., 479 F.2d 235, 241 (5th Cir. 1973) (quoting Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962); Hodgson v. Corning Glass Works, 330 F.Supp. 46, 51 (W.D.N.Y. 1971); Wirtz v. Harper Buffing Mach. Co., 280 F.Supp. 376, 382 (D. Conn. 1968).

In light of the long and offensive history of non-compliance, Defendants' full knowledge of the Act's requirements, continuing violations of the overtime compensation, minimum wage, and record-keeping provisions of the Act, and the absence of any proposed plan by Defendants for remedying the situation, we find that Plaintiff is entitled to an injunction, pursuant to section 17 of the Act, which permanently enjoins and restrains Defendants, their officers, agents, servants, employees, and those persons in active concert or participation with Defendants, from prospectively violating sections 6, 7, 11(c), 15(a)(2), and 15(a)(5) of the Act. See Metzler v. IBP, Inc., 127 F.3d 959, 963 (10th Cir. 1997) (affirming issuance of injunction because: (1) piecemeal efforts to comply were insignificant; (2) violations of the Act continued; (3) reliable testimony indicated future violations would occur; and (4) Act's

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violators refused to enter into compliance agreement with Secretary);
Reich v. Petroleum Sales, Inc., 30 F.3d 654, 657 (6th Cir. 1994)
(reversing denial of injunction because: (1) violations of the Act
continued; (2) no assurance of future compliance given; and (3) bad
faith demonstrated). We also find that an injunction is appropriate
in this case because testimony has demonstrated a high-turnover rate
in Defendants' employment rolls, thereby increasing the investigative
and administrative costs to the Secretary in enforcing the Act in the
absence of an injunction.

III. ORDER OF JUDGMENT

In light of the aforementioned factual findings and conclusions
of law, we find that Defendants are liable for unpaid minimum wage
and overtime compensation in the amount of \$418,358.32, plus an equal
amount in liquidated damages, for a total of \$836,716.64, and **ORDER**
them to remit this amount in a time schedule acceptable to Plaintiff.

We also **ORDER** Defendants to submit all necessary employment
records to the appropriate authorities in the Department of Labor so
that they can determine what additional minimum wage, overtime
compensation, and liquidated damages, if any, are due to the truck
drivers for the period after September 13, 1999 to the present.

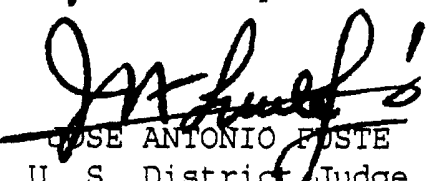
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1 Finally, we **ENJOIN** Defendants from continued and future
2 violations of sections 6, 7, 11(c), 15(a)(2), and 15(a)(5) of the
3 Act.

4 **IT IS SO ORDERED.**

5 San Juan, Puerto Rico, this 15th day of February, 2000.

6 
7 JOSE ANTONIO POSTE
8 U. S. District Judge
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